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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Samantha DeVilbiss,

10 Plaintiff,

11 v.

12 Martin O'Malley,<sup>1</sup>  
13 Commissioner of Social Security,  
14 Defendant.

No. CV-23-0387-TUC-AMM (EJM)

**REPORT AND RECOMMENDATION**

15 Currently pending before the Court is Plaintiff Samantha DeVilbiss's Opening Brief  
16 (Doc. 19). Defendant filed his Answering Brief ("Response") (Doc. 21), and Plaintiff  
17 replied ("Reply") (Doc. 22). Plaintiff brings this cause of action for review of the final  
18 decision of the Commissioner for Social Security pursuant to 42 U.S.C. § 405(g). Compl.  
19 (Doc. 1).

20 Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure,<sup>2</sup> this matter  
21 was referred to Magistrate Judge Markovich for Report and Recommendation. Based upon  
22 the pleadings of the parties and the administrative record submitted to the Court, the  
23 Magistrate Judge recommends that the District Judge REVERSE and REMAND the  
24 decision of the Commissioner.

25 \_\_\_\_\_  
26 <sup>1</sup> The Court takes judicial notice that Kilolo Kijakazi is no longer Acting Commissioner of  
27 the Social Security Administration ("SSA"). The Court will substitute the new Commissioner of  
28 the SSA, Martin O'Malley, as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil  
Procedure. *See also* 42 U.S.C. § 405(g).

<sup>2</sup> Rules of Practice of the United States District Court for the District of Arizona.

## I. BACKGROUND

### A. *Procedural History*

This cause of action follows a previous federal case in which the Parties stipulated remand to the Commissioner. *DeVilbiss v. Kijakazi*, No. CV-21-00075-TUC-SHR (LAB), Order Granting Stipulated Mot. to Remand (D. Ariz. Jan. 25, 2022), ECF No. 33. On March 15, 2022, the Appeals Council issued its order vacating the final decision of the Commissioner and remanding the matter to an Administrative Law Judge (“ALJ”) for further consideration and development of the record, including an additional hearing, to address shortcomings in the ALJ’s prior analysis of the severity of claimant’s mental impairments and evaluation of the medical source opinions. *See* Administrative Record (“AR”) at 2036, 2041–45.<sup>3</sup> Plaintiff’s applications prior to remand included a Title II application for Social Security Disability Insurance Benefits (“DIB”), as well as a Title XVI application for Supplemental Security Income (“SSI”) alleging disability beginning March 20, 2018, due to multiple back injuries, severe pain, arthritis, hypertension, high cholesterol, incontinence, severe mental illness, bipolar disorder, depression, anxiety, and post-traumatic-stress disorder (“PTSD”). *See id.* at 25, 28, 50, 78–79, 95–96, 112, 114–15, 132–33, 150–51, 167–68, 184–85, 260, 289, 306, 335, 337, 1698, 1700, 1713, 1757, 1781–82, 1795–96, 1816, 1829–30, 1993, 2000. While the previous federal case was pending, Plaintiff filed subsequent Title II and Title XVI applications. *See id.* at 1735, 2045. These later applications were considered duplicates of Plaintiff’s original claims and consolidated with them on remand. *Id.* On November 28, 2022, following remand, a telephonic hearing was held before ALJ Yasmin Elias. *Id.* at 1697, 1723–53. On December 19, 2022, the ALJ issued an unfavorable decision. *Id.* at 1639–47, 1694–1713. On January 18, 2023, Plaintiff requested review of the ALJ’s decision by the Appeals Council, and on June 30, 2023, review was denied. *Id.* at 1621–27, 1631–38, 1939–43. On August 17, 2023, Plaintiff filed this cause of action. Compl. (Doc. 1).

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<sup>3</sup> Page numbers refer to the page numbers demarcated in the Administrative Record rather than the Court’s Case Management/Electronic Case Files (“CM/ECF”) page numbers.

1           **B. Factual Background<sup>4</sup>**

2           Plaintiff was thirty-five (35) years old at the time of the alleged onset of her  
3           disability and forty (40) years old at the time of the administrative hearing on remand. AR  
4           at 25, 28, 36, 50, 78–79, 95–96, 112, 114–15, 132–33, 150–51, 167, 184, 251, 260, 306,  
5           335, 337, 1658, 1661, 1677, 1680, 1683, 1686, 1712, 1723, 1781–82, 1795–96, 1816,  
6           1829–30, 1946. Plaintiff completed high school, as well as two years of college. *Id.* at 36,  
7           92, 110, 112, 129, 147, 165, 182, 184, 290, 1712, 1781, 1795, 1829, 1994. Prior to her  
8           alleged disability, Plaintiff worked as a line cook, server, and car salesperson. *Id.* at 68,  
9           92, 109, 129, 147, 164–65, 181–82, 290, 1981–91.

10           **1. Plaintiff’s Medical Treatment Records<sup>5</sup>**

11           Beginning in 2011, Plaintiff was treated by Austin Allen Gentry, DC, PT for  
12           ongoing left low back pain and left leg radiation due to a rear-end automobile collision in  
13           September 2010. AR at 358–80. Beginning in March 2014 through the beginning of 2018,  
14           Plaintiff sought treatment from Gary A. Love, DC for neck, mid- and low-back pain. *Id.*  
15           at 590–749. On October 9, 2015, Plaintiff underwent spinal surgery including a posterior  
16           thoracolumbar laminectomy and discectomy and a posterior bilateral L4/L5 discectomy.  
17           *Id.* at 390–98, 535–36. On November 19, 2015, Plaintiff had her six (6) week follow-up  
18           with her surgeon, Brian P. Callahan, M.D., and reported that she still had some back pain,  
19           but it was improving and she no longer had pain or numbness down her legs. *Id.* at 458,  
20           500–501.

21           On November 22, 2017, Plaintiff was seen by Efrain L. Cubillo, M.D. at the Pain  
22           Institute of Southern Arizona for an initial consult. *Id.* at 473–77, 868–77. Plaintiff

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23           <sup>4</sup> Plaintiff’s Opening Brief raises a single issue for review, alleging that “[t]he ALJ’s  
24           [a]nalysis of [o]pinion [e]vidence [i]s [n]ot [b]ased upon [s]ubstantial [e]vidence.” Opening Br.  
25           (Doc. 19) at 2, 5–10. As such, the Court has focused its factual background on Plaintiff’s medical  
26           records, including Plaintiff’s examination by Consultative Examiner Jeri B. Hassman, M.D. and  
27           her report. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)  
(the Court will only review issues raised by Plaintiff in her opening brief).

28           <sup>5</sup> Although the Court has reviewed the entirety of Plaintiff’s medical records, its summary  
is generally limited to records subsequent to her alleged onset date and related to her back pain  
with radiation into her legs.

1 presented with mid- to low-back and leg pain. AR at 473, 868. Plaintiff reported that she  
2 had seen Dr. Callahan and was told she was not a surgical candidate. *Id.* Plaintiff's  
3 lumbosacral spine exhibited severe tenderness with palpation. *Id.* at 475, 870. Plaintiff  
4 also had a positive straight leg test on the left and abnormal knee jerk reflexes. *Id.* After  
5 establishing care, and prior to her alleged onset date, Plaintiff began treating regularly at  
6 the Pain Institute. *Id.* at 849–67.

7 On March 1, 2018, Plaintiff saw Gary A. Love, DC for an adjustment. AR at 600–  
8 01. Plaintiff complained of moderate neck and mid-back pain, as well as severe low back  
9 pain. *Id.* at 601. On March 13, 2018, Plaintiff returned to Dr. Cubillo for re-evaluation.  
10 *Id.* at 837–40. Dr. Cubillo discussed the spinal cord stimulator trial with Plaintiff, who  
11 expressed concern regarding diaphoresis and the dressing during the trial because she  
12 worked in a kitchen as a chef. *Id.* at 837, 840. Dr. Cubillo increased Plaintiff's oxycodone  
13 by an extra tablet per day due to her reports of increased pain. *Id.* at 840. On March 29,  
14 2018, Plaintiff returned to Dr. Love. AR at 598–99. Dr. Love's treatment records were  
15 generally unremarkable. *Id.* at 598. Plaintiff reported moderately severe neck pain,  
16 moderate mid-back pain, and severe low back pain. *Id.* at 599. On March 30, 2018,  
17 Plaintiff was seen at Tucson Medical Center ("TMC") for a head injury with back and arm  
18 pain after being kicked by a horse. *Id.* at 389–90, 408–18. Computerized tomography  
19 ("CT") scans of Plaintiff's cervical spine on the same date showed "[m]ild degenerative  
20 changes throughout the cervical spine[,] . . . [but] no disc protrusion or cord compression,  
21 with mild multilevel foraminal narrowing." *Id.* at 532–33.

22 In April 2018, Plaintiff was seen three (3) times by Dr. Love regarding her moderate  
23 neck and mid-back pain, as well as severe low back pain. AR at 590–95. Early treatment  
24 records reflect pain on active ranges of motion, as well as limitation of motion. *Id.* at 594.  
25 Subsequent records indicate that Plaintiff did not exhibit any apparent distress. *Id.* at 592.  
26 On April 3, 2018, Plaintiff saw Sylvia P. Valenzuela, FNP-C at the Pain Institute of  
27 Southern Arizona for a medication check. *Id.* at 831–34. NP Valenzuela continued  
28 Plaintiff's pharmacotherapy without modification. *Id.* at 834. On April 20, 2018, Plaintiff

1 was seen by Dr. Cubillo for placement of a trial spinal cord stimulator. AR at 826–28. The  
2 procedure was unremarkable and well-tolerated. *Id.* at 827–28. On April 25, 2018,  
3 Plaintiff returned to Dr. Cubillo following a trial spinal cord stimulation. *Id.* at 823–25.  
4 Plaintiff reported 50–75% relief while using the spinal cord stimulator. *Id.* at 823–24. Dr.  
5 Cubillo removed the spinal cord stimulator leads without incident. *Id.* at 824.

6 On May 4, 2018, Plaintiff returned to NP Valenzuela for a medication check. AR  
7 at 819–22. Review of Plaintiff’s systems was generally unremarkable, but noted neck pain  
8 and stiffness, cough, numbness and tingling, and muscle tenderness. *Id.* at 821. NP  
9 Valenzuela continued Plaintiff’s pharmacotherapy unchanged. *Id.* at 822. On May 15,  
10 2018, Plaintiff saw Dr. Callahan regarding a permanent spinal stimulator. *Id.* at 485–86,  
11 495–96, 2239–49. Treatment records reflect that Plaintiff “had a microdiscectomy and did  
12 well in the past but has since been in multiple car accidents[,] . . . [and] now has chronic  
13 low back pain and leg pain.” *Id.* at 485, 495, 2239. Dr. Callahan’s physical examination  
14 of Plaintiff was unremarkable and his assessment included failed back surgical syndrome.  
15 AR at 485, 495, 2239. On May 30, 2018, Plaintiff was seen at Tucson Medical Center  
16 (“TMC”) for a thoracic laminotomy and implantation of a permanent spinal cord  
17 stimulator. *Id.* at 382–89. Treatment records reflect that Plaintiff tolerated the procedure  
18 well. *Id.* at 384.

19 On June 6, 2018, Plaintiff saw NP Valenzuela for a medication check. *Id.* at 815–  
20 18. Plaintiff reported that she had a permanent spinal cord stimulator placed six (6) days  
21 prior and was in a lot of pain. *Id.* at 815. Plaintiff’s pharmacotherapy was continued  
22 unchanged. AR at 818. On June 14, 2018, Plaintiff saw Dr. Callahan for her two (2) week  
23 follow-up after surgery. *Id.* at 482, 493–94. Plaintiff reported continued pain and muscle  
24 spasms following surgery. *Id.* at 482, 493. The stimulator was programmed and Plaintiff  
25 reported being pleased with the results. *Id.* On the same date, Plaintiff saw NP Valenzuela  
26 for a medication check. *Id.* at 812–14. NP Valenzuela noted Plaintiff suffered from a mild  
27 to moderate level of pain and was able to perform her previous occupation without  
28 restrictions. AR at 813. Treatment records reflect a generally unremarkable review of

1 Plaintiff's systems, but positive for neck pain and stiffness, some tingling and numbness,  
2 as well as muscle tenderness. *Id.* Plaintiff's physical examination was unremarkable. *Id.*  
3 Plaintiff's pharmacotherapy remained unchanged. *Id.* at 814. On June 14, 2018, Plaintiff  
4 returned to Dr. Callahan for a follow-up regarding her spinal cord stimulator placement.  
5 *Id.* at 2237–38. Plaintiff reported “lots of muscle spasms and pain from surgery.” AR at  
6 2237. Dr. Callahan spent time programming the stimulator with Plaintiff, and she reported  
7 being pleased with the results. *Id.*

8 On August 7, 2018, Plaintiff was seen at Chiricahua Community Health Centers,  
9 Inc. in Bisbee, Arizona for Chronic Pain Management. *Id.* at 448–54, 562–68. Plaintiff  
10 reported that she had lost her job and insurance and had moved to Bisbee for financial  
11 reasons. *Id.* at 448, 562. Depression screening was positive for mild depression. *Id.* at  
12 449, 563. Review of Plaintiff's systems was generally unremarkable, but positive for  
13 anxiety and depression, as well as back, neck, and joint pain. AR at 451, 465. Plaintiff  
14 reported pain as 8/10. *Id.* at 452, 566. Plaintiff's physical examination was generally  
15 unremarkable, but showed an antalgic gait, and severe pain with motion in her lumbar  
16 spine. *Id.* Plaintiff received a prescription refill of her pain medication. *Id.* On the same  
17 date, Plaintiff was discharged by Sylvia P. Valenzuela, FNP-C at the Pain Institute of  
18 Southern Arizona. *Id.* at 456, 809–10.

19 On September 18, 2018, Plaintiff was seen at Chiricahua Community Health Center  
20 for depression associated with chronic pain. *Id.* at 556–61, 765–75. On September 27,  
21 2018, Plaintiff returned to Chiricahua Community Health Centers for chronic pain  
22 management and cold symptoms. AR at 549–55. Plaintiff was given a refill of her pain  
23 medication as a bridge until she could see pain management. *Id.* at 553.

24 On October 18, 2018, Plaintiff followed-up with Dr. Callahan. *Id.* at 491–92, 1470–  
25 71, 2235–36. Plaintiff reported that “the stimulator treat[s] her neuropathic leg pain very  
26 well[;] [h]owever[,] it does not help her chronic low back pain.” *Id.* at 491, 1470, 2235.  
27 Dr. Callahan observed that the stimulator seemed to be helping her legs but not her low  
28 back pain and required x-rays to check the stimulator's position. *Id.* On the same date,

1 Plaintiff had radiographs of her thoracic spine taken. AR at 2241. Radiographs confirm  
2 an “intraspinous nerve stimulator device entering the spinal canal at T9-T20 and extending  
3 superiorly to T6-T7.” *Id.* On October 30, 2018, Plaintiff was seen by Melba Travis, FNP-  
4 BC at Chiricahua Community Health Center for chronic pain management. *Id.* at 542–48.  
5 Plaintiff reported persistent pain in her lower back, legs, and neck at a level of 7/10. *Id.* at  
6 542, 546. NP Travis’s physical examination of Plaintiff indicated moderate distress, ill  
7 appearance, vesicle lesion on her left shoulder, antalgic gait, and severe pain with motion  
8 in her lumbar spine. *Id.* at 546.

9 On November 14, 2018, Plaintiff returned to Dr. Cubillo for reevaluation. AR at  
10 804–808. Plaintiff reported low back and leg pain. *Id.* at 804. Plaintiff further reported  
11 that her leg pain was significantly improved after implantation of a spinal cord stimulator;  
12 however, she continues to have lower back pain. *Id.* Plaintiff indicated her pain level was  
13 7/10. *Id.* Dr. Cubillo’s physical examination of Plaintiff was unremarkable. *Id.* at 806–  
14 807. Lumbar medial branch blocks were discussed. AR at 807.

15 On December 7, 2018, Plaintiff was seen by Dr. Cubillo for a bilateral lumbar  
16 medial branch block. *Id.* at 801–803. Plaintiff tolerated the procedure well. *Id.* at 802–  
17 803. On December 12, 2018, Plaintiff returned to Dr. Love for treatment. *Id.* at 596–97.  
18 Dr. Love noted that Plaintiff did not show any apparent signs of distress. *Id.* at 596.  
19 Plaintiff indicated that her spinal cord stimulator had been placed, but she continued to  
20 have moderate neck pain and stiffness. AR at 597. On the same date, Plaintiff returned to  
21 NP Valenzuela for a medication check. *Id.* at 796–800. Plaintiff reported 80–100% pain  
22 relief from a lumbar medial branch block injection the previous week. *Id.* at 796.  
23 Treatment records reflect mild to moderate levels of pain and the Plaintiff was able to  
24 perform her previous occupation without restriction. *Id.* at 797. On December 28, 2018,  
25 Plaintiff saw Dr. Cubillo for a lumbar medial branch block. *Id.* at 793–95. Plaintiff  
26 reported “greater than 80% relief of the pain for several hours” following lumbar medial  
27 branch blocks at her prior visit. AR at 795. Dr. Cubillo noted that if Plaintiff “gets similar  
28 results, the patient will be a candidate for lumbar facet rhizotomy.” *Id.* The procedure was



1 performed without incident. *Id.* at 794.

2 On January 18, 2019, Plaintiff returned to NP Valenzuela for a medication check.  
3 *Id.* at 1014–21. NP Valenzuela continued Plaintiff’s pharmacotherapy without  
4 modification. *Id.* at 1017. On January 21, 2019, Plaintiff was seen by Dr. Cubillo for  
5 bilateral lumbar radiofrequency rhizotomy. AR at 1008–11. The procedure was performed  
6 without complication and was well-tolerated. *Id.* at 1009–10. On January 28, 2019,  
7 Plaintiff reported approximately 30% relief from the procedure. *Id.* at 1012. On February  
8 18, 2019, Plaintiff saw NP Valenzuela for a medication check. *Id.* at 1000–1007. NP  
9 Valenzuela continued Plaintiff’s pharmacotherapy without modification. *Id.* at 1003.

10 On March 4, 2019, Plaintiff followed-up with Dr. Cubillo. AR at 989–96.  
11 Treatment records reflect that Dr. Cubillo performed bilateral radiofrequency ablation on  
12 Plaintiff on January 21, 2019, and she reported approximately 80% relief of her low back  
13 pain, but continued to have pain in the area of her sacroiliac joints. *Id.* at 989. Plaintiff  
14 requested Dr. Cubillo fill out disability paperwork; however, did not feel comfortable  
15 without a full day examination on what she can and cannot do and referred her to his  
16 colleague Karen Lunda for evaluation. *Id.* at 992. Dr. Cubillo continued Plaintiff’s  
17 pharmacotherapy without modification. *Id.* On March 19, 2019, Plaintiff saw Nichole  
18 Laux, FNP-C at the Pain Institute of Arizona for a medication check. *Id.* at 983–88. NP  
19 Laux continued Plaintiff’s pharmacotherapy without modification. AR at 988. On March  
20 25, 2019, Plaintiff returned to Dr. Cubillo for a sacroiliac joint injection. *Id.* at 975–78.  
21 The procedure was uneventful and well-tolerated. *Id.* at 976–77.

22 On April 2, 2019, Plaintiff indicated that she did not experience any relief from the  
23 sacroiliac joint injection. *Id.* at 979. On April 8–9, 2019, Plaintiff saw Karen Lunda, M.S.,  
24 P.T. for evaluation. *Id.* at 1022–37, 1596–1611. Ms. Lunda reported that Plaintiff was  
25 “above average for grip strength for women her age as well as above average with fine  
26 motor testing.” AR at 1022, 1596. Ms. Lunda further observed that Plaintiff “self-limited  
27 on the lifts and carries and because of the degree of emotion she was not pushed on either  
28 day[,]” and posited that Plaintiff’s true safe maximum was not reached for all test items.



1 *Id.* Ms. Lunda reported that Plaintiff “scored 80 % on the Oswestry low back pain scale  
2 which measures the client’s perception of their abilities[,] [and] . . . falls in the category of  
3 crippled (61-80%) which is defined as ‘back pain impinges on all aspects of the patient’s  
4 life[,] [p]ositive intervention is required.’” *Id.* at 1023, 1597. Ms. Lunda observed that  
5 “[o]n some tests [Plaintiff] scored above average . . . and others she self-limited.” *Id.* at  
6 1024. Ms. Lunda further noted that “[b]ecause of the level of emotion she was not pushed  
7 on either day and testing was stopped based on what she thought she could do[,]” which is  
8 “a psychophysical approach [and] not the normal kinisiophysical approach used in the  
9 Workwell FCE.” *Id.* at 1024.

10 Ms. Lunda reported that Plaintiff “ambulates with a very stiff and rigid gait pattern.”  
11 AR at 1026. Ms. Lunda noted that when standing with her shoes off, Plaintiff’s right iliac  
12 crest is slightly higher than the left, and she had a decrease in her lumbar curvature when  
13 viewed from the side. *Id.* at 1027. Plaintiff exhibited gross coordination within normal  
14 limits and was able to assume and maintain unilateral standing balance for ten (10) seconds  
15 bilaterally. *Id.* Ms. Lunda reported Plaintiff “was limited in hip flexion with the knee  
16 flexed to 100° bilaterally during physical exam[,] [but] [f]ull hip flexion was noted during  
17 the floor to waist lift later in the evaluation. *Id.* When Plaintiff to bent over with her  
18 fingertips toward the floor, she bent at the hip with minimal movement in the lumbar spine.  
19 *Id.* Additionally, she exhibited 50% of gross motion and reported increased low back pain  
20 on extension. AR at 1027. Plaintiff also exhibited very limited rotation at approximately  
21 25% of motion bilaterally. *Id.* at 1027.

22 Under Manual Muscle Testing, Ms. Lunda observed that Plaintiff “performs a fair  
23 contraction of her abdominal musculature which produces mild elicitation of the lumbar  
24 trunk extensors.” *Id.* Ms. Lunda further observed that when “asked if she could suck her  
25 belly button in toward her spine[,] [Plaintiff] stated this caused tightness in the muscles in  
26 the mid back area where she experiences the spasms (mid and lower thoracic area).” *Id.*  
27 Ms. Lunda reported that Plaintiff experienced spasming in the mid-back with hip extension  
28 on the left. *Id.* As a result, Plaintiff “transitioned to supine hook-lying[,] [and] [a]fter 3

1 minutes, she stated she felt a pop which released the spasm.” AR at 1028. Ms. Lunda  
2 inquired how often this occurred, and Plaintiff reported daily, estimating it occurs between  
3 three (3) and six (6) times per day. *Id.* Ms. Lunda indicated that Plaintiff was able to  
4 perform ten (10) toe raises on the right and left, with greater difficulty on the right which  
5 Plaintiff reported caused increased low back pain. *Id.* Ms. Lunda noted that Plaintiff was  
6 initially able to achieve 115° of knee flexion when squatting, but was instructed to stand  
7 back up “as there was some quivering on the lower extremities.” *Id.* Plaintiff was  
8 subsequently able to “assume[] a full squat and returned back up to standing.” *Id.* A similar  
9 pattern was repeated on the second day of testing. *Id.* Ms. Lunda observed that Plaintiff  
10 was able to handle ten (10) pounds safely with what was considered minimal effort. AR  
11 at 1028.

12 Ms. Lunda noted Plaintiff had good muscle tone in both upper and lower  
13 extremities, without signs of atrophy or edema. *Id.* Ms. Lunda observed that Plaintiff’s  
14 skin over the lumbosacral area was warm to the touch. *Id.* Plaintiff denied tenderness over  
15 the greater trochanters, a little tenderness in the sacral notch bilaterally, and significant  
16 tenderness of the upper sacroiliac joint bilaterally. *Id.* Ms. Lunda further observed “a  
17 distinct change in the tone of the paraspinal musculature starting in the upper lumbar spine  
18 throughout the thoracic spine.” *Id.* at 1029. Ms. Lunda described Plaintiff’s lower lumbar  
19 spine muscles as soft and supple, but above this they were tight and taut on both days of  
20 testing. AR at 1029. Plaintiff reported muscle spasms on multiple occasions; however,  
21 Ms. Lunda was unable to differentiate between what she perceived as normal tightness of  
22 this musculature and the reported spasms. *Id.* Ms. Lunda noted Plaintiff reported some  
23 numbness in the upper buttock while sitting and after standing, but the numbness resolved,  
24 and sensation to light touch was otherwise within normal limits. *Id.*

25 Ms. Lunda described Plaintiff’s reflexes as brisk and symmetric. *Id.* Ms. Lunda  
26 also observed that Plaintiff was able to remove her shoes and put them back on without  
27 difficulty. *Id.* Ms. Lunda described Plaintiff as sitting in a chair and bending forward to  
28 loosen or attach a Velcro strap. AR at 1029. Ms. Lunda observed Plaintiff initially

1 extended her right leg to 30° while seated, but stopped due to an increase in low back pain.  
2 *Id.* On a second attempt, Plaintiff was able to extend almost to full extension. *Id.* On the  
3 left, Plaintiff extended to approximately 38° of knee extension, and then reported shooting  
4 lower extremity pain down her thigh and in her calf. *Id.* Ms. Lunda further observed that  
5 in the supine position, Plaintiff reported an increase in low back pain at 55° which increased  
6 with ankle dorsiflexion. *Id.* This also occurred on the left. AR at 1029.

7 Ms. Lunda opined that Plaintiff's "functional abilities and limitations were  
8 consistent with her diagnoses, her past medical history and objective physical examination  
9 findings." *Id.* at 1030. Ms. Lunda observed that Plaintiff's performance was consistent  
10 among functional capacity examination items, except for floor-to-waist and waist-to-crown  
11 lifts. *Id.* Ms. Lunda found that Plaintiff functioned at a higher level on Day Two than Day  
12 One in various areas. *Id.* Ms. Lunda noted that Plaintiff reported significant pain, but did  
13 not exhibit specific pain behaviors. *Id.* at 1031–32. Ms. Lunda opined that she was unable  
14 to determine forward bending in a standing capacity, but was uncertain whether Plaintiff  
15 self-limited in this endeavor. AR at 1032–33.

16 On April 18, 2019, Plaintiff returned to NP Valenzuela for a medication check. *Id.*  
17 at 1449–53. Plaintiff reported her pain level at 5/10. *Id.* at 1449. NP Valenzuela continued  
18 Plaintiff's pharmacotherapy without modification and noted that Plaintiff was off  
19 benzodiazepines. *Id.* at 1452. On May 21, 2019, Plaintiff saw NP Valenzuela for a  
20 medication check. *Id.* at 1441–48. Plaintiff reported a pain level of 5/10. AR at 1441,  
21 1446. NP Valenzuela continued to encourage increased activity, as tolerated. *Id.* at 1444.  
22 NP Valenzuela apprised Plaintiff of the practice's new guidelines which required her to  
23 either wean down to 50 morphine milligram equivalents or less or stop using medical  
24 marijuana. *Id.* at 1444, 1447. NP Valenzuela reduced Plaintiff's Xtampza ER to 9 mg  
25 from 13.5 mg, continued her oxycodone, and noted that Plaintiff would continue Cymbalta  
26 through her primary care physician. *Id.* at 1444–45, 1447. NP Valenzuela also noted that  
27 Plaintiff was currently off benzodiazepines. *Id.* at 1445, 1447.

28 On June 19, 2019, Plaintiff saw Alberto G. Corica, M.D. at Carondelet Medical

1 Group regarding her incontinence. AR at 1157–604. Plaintiff’s physical examination was  
2 unremarkable. *Id.* at 1159. Samples of Myrbetriq were given to Plaintiff. *Id.* at 1160. On  
3 June 20, 2019, Plaintiff saw NP Valenzuela for a medication check. *Id.* at 1433–40.  
4 Plaintiff reported her pain as 5/10. *Id.* at 1433, 1436. NP Valenzuela discussed new  
5 guidelines with Plaintiff. AR at 1434, 1440. NP Valenzuela noted that Plaintiff had been  
6 using medical marijuana for her PTSD; however, because her morphine milligram  
7 equivalents were greater than fifty (50), she could no longer use medical marijuana. *Id.*  
8 NP Valenzuela continued Plaintiff’s Xtampza ER and oxycodone, as well as Cymbalta  
9 which was managed by Plaintiff’s primary care physician. *Id.*

10 On July 3, 2019, Plaintiff returned to Dr. Corica for a follow-up. *Id.* at 1154–57.  
11 Plaintiff underwent a bladder scan. *Id.* at 1156. Plaintiff reported that the Myrbetriq was  
12 not really working. AR at 1156. On July 17, 2019, Plaintiff returned to NP Valenzuela for  
13 a medication check. *Id.* at 1425–32. Plaintiff reported her pain level at 5/10. *Id.* at 1425,  
14 1430. Treatment records reflect Plaintiff’s report that she stopped smoking marijuana on  
15 November 12, 2019, and indicated that she does not want her medications to be lowered  
16 further. *Id.* at 1425–26. Plaintiff also reported that her last cigarette was in May 2019. *Id.*  
17 at 1426. NP Valenzuela noted that she would continue Plaintiff’s Xtampza ER and  
18 Cymbalta through her primary care physician. AR at 1429, 1431. NP Valenzuela also  
19 noted that she would attempt to obtain a prior authorization for Amitiza, as well as having  
20 discussed Plaintiff’s blood pressure with her and directed her to speak with her primary  
21 care physician. *Id.* On July 24, 2019, NP Valenzuela added Amitiza to Plaintiff’s  
22 pharmacotherapy regimen. *Id.* at 1422–23.

23 On August 15, 2019, Plaintiff followed-up with NP Valenzuela for a medication  
24 check. *Id.* at 1411–18. Plaintiff reported her pain level at 4/10. *Id.* at 1411, 1416.  
25 Treatment records reflect encouragement of Plaintiff to increase her activity level as  
26 tolerated. *Id.* at 1414. NP Valenzuela reported that she allowed Plaintiff to start medical  
27 marijuana, for which she had a card, discontinued the Xtampza ER, and continued  
28 oxycodone. *Id.* at 1415, 1417. NP Valenzuela noted that Plaintiff would continue with

1 Cymbalta, which she received through her primary care physician. *Id.* NP Valenzuela also  
2 directed Plaintiff to speak with her primary care physician regarding her blood pressure.  
3 *Id.* On August 27, 2019, Plaintiff was seen by Alberto G. Corica, M.D. at Carondelet  
4 Medical Group for a urodynamics evaluation. *Id.* at 1150–54. Dr. Corica’s evaluation  
5 noted abnormal bladder capacity and sensation, possible dysfunctional voiding, possible  
6 hypo/areflexic bladder, and possible evidence of bladder outlet obstruction. AR at 1154.  
7 Dr. Corsica assessed unspecified urinary incontinence. *Id.*

8 On September 11, 2019, Plaintiff returned to Dr. Cubillo for bilateral lumbar  
9 radiofrequency rhizotomy. *Id.* at 1404–09, 1529–33. The procedure was unremarkable  
10 and well-tolerated. *Id.* at 1405–06, 1408. On September 12, 2019, Plaintiff was seen by  
11 Dr. Corica for a follow-up. *Id.* at 1148–50. Dr. Corica discussed different treatment  
12 options for her mixed urinary incontinence and neurogenic bladder. AR at 1150. On  
13 September 18, 2019, Plaintiff saw NP Valenzuela for a medication check. *Id.* at 1395–  
14 1403. Plaintiff reported her pain level to be 7/10, but did not have any new concerns. *Id.*  
15 at 1395, 1398–99. NP Valenzuela maintained Plaintiff’s current pharmacotherapy  
16 regimen. *Id.* at 1396, 1402. On the same date, Plaintiff reported that she did not experience  
17 at least 50% relief from the lumbar radiofrequency rhizotomy. *Id.* at 1410.

18 On October 23, 2019, Plaintiff returned to NP Valenzuela for a medication check.  
19 AR at 1385–93. Plaintiff reported her pain as 6/10. *Id.* at 1385, 1391. Treatment records  
20 continue to indicate a mild to moderate level of pain and an ability to perform her previous  
21 occupation without restrictions. *Id.* at 1386, 1391. NP Valenzuela continued Plaintiff’s  
22 pharmacotherapy without modification. *Id.* at 1389, 1392. On November 20, 2019,  
23 Plaintiff saw NP Valenzuela for a medication check. *Id.* at 1376–84. Plaintiff reported her  
24 pain at 6/10. AR at 1376, 1382. NP Valenzuela noted that Plaintiff “knows we will not  
25 escalate doses” and left her pharmacotherapy plan unchanged. *Id.* at 1380, 1383. On  
26 December 16, 2019, Plaintiff returned to NP Valenzuela for a medication check. *Id.* at  
27 1339–47. Plaintiff reported her pain as 6/10. *Id.* at 1339, 1345. NP Valenzuela continued  
28 to encourage increased activity and did not change Plaintiff’s pharmacotherapy. *Id.* at

1 1343, 1347.

2 On January 22, 2020, Plaintiff saw NP Valenzuela for a medication check. AR at  
3 1329–38. Plaintiff reported her pain to be 5/10. *Id.* at 1329, 1335. NP Valenzuela did not  
4 change Plaintiff’s pharmacotherapy. *Id.* at 1333, 1337. On February 4, 2020, Plaintiff saw  
5 Dr. Cubillo for re-evaluation. *Id.* at 1320–28, 1485. Because Plaintiff was “not getting  
6 good back pain coverage from her current stimulator[,]” Dr. Cubillo discussed changing  
7 her current spinal cord stimulator to a different system. *Id.* at 1323–24, 1328. Dr. Cubillo  
8 did not alter Plaintiff’s pharmacotherapy. AR at 1324, 1328. On February 20, 2020,  
9 Plaintiff returned to NP Valenzuela for continuing treatment. *Id.* at 1089–91, 1310–18.  
10 Plaintiff reported her pain as 5/10. *Id.* at 1089, 1310, 1316. Plaintiff’s pharmacotherapy  
11 remained unchanged. *Id.* at 1091, 1314.

12 On March 23, 2020, Plaintiff was seen by NP Valenzuela and did not report any  
13 new concerns. *Id.* at 1086–88, 1300–1308. Plaintiff reported her pain as 3/10. AR at 1086,  
14 1300, 1306. Plaintiff’s pharmacotherapy was continued unchanged. *Id.* at 1088, 1304,  
15 1308. On March 24, 2020, Plaintiff was seen by Stephen Goldfarb, DO at Cochise  
16 Oncology for leukocytosis with a white count of 16,100. *Id.* at 1285–89. Plaintiff reported  
17 that she did not need assistance with her activities of daily living, but indicated suffering  
18 chronic back pain and fatigue. *Id.* at 1286. Dr. Goldfarb’s review of Plaintiff’s systems  
19 was generally unremarkable, except for chronic back pain, fatigue, and diarrhea. *Id.* at  
20 1286–87. Plaintiff’s physical examination was similarly unremarkable. AR at 1287–88.

21 On May 14, 2020, Plaintiff had a videoconference appointment with Dr. Cubillo.  
22 *Id.* at 1290–98. Plaintiff reported her pain as 3/10. *Id.* at 1291. Dr. Cubillo encouraged  
23 Plaintiff to increase her activity level and continued her current pharmacotherapy regimen.  
24 *Id.* at 1294. On June 16, 2020, Plaintiff saw NP Valenzuela for a telemedicine appointment.  
25 *Id.* at 2612–17. Plaintiff’s pain level was 3/10. AR at 2613. NP Valenzuela did not alter  
26 Plaintiff’s pharmacotherapy. *Id.* at 2616. On July 20, 2020, Plaintiff had a telemedicine  
27 appointment with NP Valenzuela. *Id.* at 2606–11. Plaintiff reported her pain severity as  
28 3/10. *Id.* at 2607. NP Valenzuela left Plaintiff’s pharmacotherapy unchanged. *Id.* at 2610.



1 On August 18, 2020, Plaintiff had a telemedicine appointment with NP Valenzuela.  
2 AR at 2598–2603. Plaintiff reported her pain level at 3/10. *Id.* at 2599. NP Valenzuela  
3 did not modify Plaintiff’s pharmacotherapy. *Id.* at 2602. On August 19, 2020, Plaintiff  
4 established care with Nathan S. Conlee, D.C. and returned on August 26, 2020, following  
5 a motor vehicle accident on August 2, 2020, in which the car which Plaintiff was driving  
6 struck a deer. *Id.* at 2055–63, 2079–84. Plaintiff complained of constant neck, mid-, and  
7 low-back pain, as well as headaches. *Id.* at 2055–56, 2079. Dr. Conlee reported that  
8 Plaintiff ambulated without assistance but exhibited restricted range of motion in both  
9 her cervical and lumbar spine. AR at 2056, 2079. Dr. Conlee further noted muscle spasm  
10 and tenderness in Plaintiff’s paravertebral trapezial musculature, as well as interspinous  
11 ligament tenderness at C5 and L5. *Id.* On August 28, 2020, Plaintiff was again seen by  
12 Dr. Conlee, who noted that her condition was improving. *Id.* at 2085–86. Dr. Conlee’s  
13 treatment plan reflected that Plaintiff was to be seen three (3) times per week for three (3)  
14 weeks. *Id.* at 2085. On August 31, 2020, Dr. Conlee noted that Plaintiff was progressing  
15 as anticipated. *Id.* at 2087.

16 In early September 2020, Plaintiff was treated by Dr. Conlee and continued to show  
17 improvement. AR at 2089–92. Then on September 8, 2020, treatment records reflect that  
18 her condition “ha[d] been exacerbated due to traveling.” *Id.* at 2093. Dr. Conlee noted  
19 positive tests for joint dysfunction of Plaintiff’s cervical, thoracic, and lumbar regions, but  
20 some improvement in her cervical and lumbar range of motion and musculature. *Id.*  
21 Subsequent visits indicated the Plaintiff continued to progress as anticipated. *Id.* at 2095–  
22 98. On September 16, 2020, Plaintiff reported increased back pain; however, Dr. Conlee  
23 noted that “[f]unctionally her spinal and joint mobility and muscle tension is improved.”  
24 *Id.* at 2099. On the same date, Plaintiff had a telemedicine appointment with NP  
25 Valenzuela. AR at 2591–97. Plaintiff reported her pain level at 3/10. *Id.* at 2592. NP  
26 Valenzuela did not modify Plaintiff’s pharmacotherapy. *Id.* at 2591. Records from  
27 subsequent visits with Dr. Conlee noted continuing improvement overall. *Id.* at 2101–  
28 2106. On September 29, 2020, Plaintiff returned to Dr. Conlee for re-evaluation. *Id.* at



1 2064–71, 2107–2108. Dr. Conlee noted Plaintiff exhibited an unrestricted range of motion  
2 of the cervical spine, although tightness was noted in the left trapezial musculature with  
3 right lateral flexion. AR at 2064. Plaintiff ambulated without assistance and a posture  
4 analysis did not reveal un-leveling. *Id.* Dr. Conlee further reported that Plaintiff exhibited  
5 a restricted range of motion of the lumbar spine in flexion and extension with pain at L5 in  
6 all ranges. *Id.* at 2065. Plaintiff could not perform bilateral leg raise test and had a positive  
7 Yeoman’s with right testing. *Id.* Dr. Conlee noted tenderness and muscle spasm in the  
8 lumbar musculature bilaterally. *Id.* at 2065. Dr. Conlee indicated improvement in all areas.  
9 AR at 2065–66, 2107–2108.

10 Throughout October 2020, Dr. Conlee’s treatment records reflect Plaintiff’s  
11 continued improvement. *Id.* at 2109–20. On October 30, 2020, Plaintiff returned to Dr.  
12 Conlee for re-evaluation. *Id.* at 2072–78. Plaintiff exhibited an unrestricted range of  
13 motion of the cervical spine without pain. *Id.* at 2072. Plaintiff ambulated without  
14 assistance. *Id.* Dr. Conlee reported a restricted range of motion in Plaintiff’s lumbar spine,  
15 with pain in the lumbar musculature at L5 in all ranges. AR at 2073. Plaintiff reported  
16 pain at L5 with bilateral leg raise test, Eli leg raise test, and Yeoman’s. *Id.* Dr. Conlee  
17 noted some muscle tenderness in the sub-occipital trapezial musculature and significant  
18 tenderness in the lumbar-musculature bilaterally. *Id.* Dr. Conlee indicated improvement  
19 in all areas, with some issues having been resolved. *Id.* at 2073–74. On October 15, 2020,  
20 Plaintiff had a telemedicine appointment with NP Valenzuela. *Id.* at 2584–90. Plaintiff  
21 reported her pain level as 3/10. AR at 2585. NP Valenzuela maintained Plaintiff’s  
22 pharmacotherapy. *Id.* at 2589. In October and November 2020, Plaintiff was seen at  
23 Chiricahua Community Health Centers regarding her hyperlipidemia. *Id.* at 2309–24. At  
24 these appointments, Plaintiff reported her pain to be at a 7/10. *Id.* at 2313, 2322–23.

25 On December 1, 2020, Plaintiff had a telemedicine appointment with Merry A.  
26 Troupe, FNP at the Pain Institute of Southern Arizona. *Id.* at 2575–81. Plaintiff  
27 complained of mid- to low-back and leg pain, rating her pain at 4/10. AR at 2575. NP  
28 Troupe kept Plaintiff’s pharmacotherapy unchanged. *Id.* at 2580. On December 17, 2020,

1 Plaintiff had a telemedicine appointment with NP Valenzuela. *Id.* at 2568–74. NP  
2 Valenzuela did not alter Plaintiff’s pharmacotherapy. *Id.* at 2573.

3 On January 12, 2021, Plaintiff saw NP Valenzuela for a telemedicine appointment.  
4 *Id.* at 2561–67. Plaintiff reported her pain at a level of 6/10. AR at 2562. NP Valenzuela  
5 maintained Plaintiff’s pharmacotherapy. *Id.* at 2566. On January 25, 2021, Plaintiff saw  
6 Nicole M. Nelson-Bridges, PA-C at the Pain Institute of Southern Arizona for removal of  
7 spinal cord stimulator leads following a trial. *Id.* at 2559–60. Plaintiff reported greater  
8 than 50% relief during the trial. *Id.* at 2559. On February 11, 2021, Plaintiff had a  
9 telemedicine appointment with NP Valenzuela. *Id.* at 2547–53. Plaintiff reported her pain  
10 at 4/10. AR at 2548. NP Valenzuela did not modify Plaintiff’s pharmacotherapy regimen.  
11 *Id.* at 2552. On February 25, 2021, Plaintiff saw Dennis L. Paul, PA-C at the Pain Institute  
12 of Southern Arizona for removal of the leads following a trial of the Nevro Spinal Cord  
13 Stimulator. *Id.* at 2537–46. Plaintiff “report[ed] 50–75% relief throughout the duration of  
14 the trial.” *Id.* at 2537. Plaintiff also confirmed “a decrease in pain and state[d] her quality  
15 of life improved during the trial.” *Id.* at 2537, 2543. Plaintiff reported a pain level of 4/10.  
16 AR at 2537. From March through May 2021, Plaintiff was seen at Chiricahua Community  
17 Health Centers for treatment of her diabetes, hypertension, and depression. *Id.* at 2276–  
18 2308. Plaintiff reported her pain beginning at 4/10 through 7/10 during this period. *Id.* at  
19 2280, 2289, 2298, 2305. On March 15, 2021, Plaintiff had telemedicine appointments with  
20 Dr. Cubillo and NP Valenzuela. AR at 2526–36. Dr. Cubillo spoke to Plaintiff regarding  
21 a referral to an infectious disease specialist. *Id.* at 2526. Plaintiff reported her pain to NP  
22 Valenzuela as 4/10. *Id.* at 2530. NP Valenzuela maintained Plaintiff’s pharmacotherapy  
23 without modification. *Id.* at 2534. On April 13, 2021, Plaintiff had a telemedicine  
24 appointment with NP Valenzuela. *Id.* at 2518–25. NP Valenzuela noted that Plaintiff’s  
25 pharmacotherapy would remain unchanged. AR at 2523.

26 On May 4, 2021, Plaintiff followed-up with Dr. Callahan. *Id.* at 2233–34, 2689–  
27 90. Dr. Callahan assessed Plaintiff with failed back surgical syndrome and opined that  
28 there were no further surgeries that he could perform. *Id.* Dr. Callahan further opined that

1 “[i]t [wa]s doubtful that her pain w[ould] improve to a point where she could go back to  
2 her work as a chef.” *Id.* at 2234, 2690. On May 6, 2021, Plaintiff was seen by Catherine  
3 Azar, M.D. at Arizona Blood & Cancer Specialists. *Id.* at 2242–44. Treatment records  
4 reflect that Plaintiff had “a probable benign leukocytosis and mild secondary  
5 polycythemia.” AR at 2242. Dr. Azar noted that “[t]here is no recommendation for further  
6 followup, evaluation, or treatment[.]” and noted that both conditions may be linked to  
7 Plaintiff’s smoking. *Id.* On May 13, 2021, Plaintiff had a telemedicine appointment with  
8 NP Valenzuela. *Id.* at 2510–17. NP Valenzuela indicated that she would continue  
9 Plaintiff’s pharmacotherapy unchanged. *Id.* at 2515. On May 19, 2021, Dr. Callahan  
10 provided a care summary regarding his treatment of Plaintiff. *Id.* at 2339–40. Dr. Callahan  
11 reported that there were no other surgical procedures that he could perform at this time,  
12 and opined that Plaintiff was unable to work due to her chronic pain and “multiple other  
13 medical problems[.]” AR at 2339.

14 On June 15, 2021, Plaintiff saw Kerry B. Kopecky, FNP-C at the Pain Institute of  
15 Southern Arizona for a pre-operative evaluation. *Id.* at 2499–2509. This assessment was  
16 in advance of placement of a new spinal cord stimulator. *Id.* at 2499, 2506. Treatment  
17 records reflect a functional assessment from May 2021 showed a mild to moderate level of  
18 pain, and that Plaintiff was able to perform her previous occupation without restrictions.  
19 *Id.* at 2500–2501. On June 16, 2021, Plaintiff saw NP Valenzuela for a telemedicine  
20 appointment. *Id.* at 2491–98. Plaintiff reported that “her medications allow her to function  
21 during her days.” AR at 2491. NP Valenzuela reported that she would continue Plaintiff  
22 on her current pharmacotherapy. *Id.* at 2496. On June 29, 2021, Plaintiff saw NP Kopecky  
23 for a lumbar support brace fitting. *Id.* at 2489–90.

24 On July 12, 2021, Plaintiff was seen by PA Paul for a follow-up after permanent  
25 implantation of a Nevro Spinal Cord Stimulator. *Id.* at 2485–88. Treatment records  
26 indicated that Plaintiff’s “current pain regimen [wa]s working well.” *Id.* at 2485. Records  
27 further indicated that Plaintiff “continue[d] to have mild postoperative pain, but it [wa]s  
28 well managed with prescribed analgesic.” AR at 2488. On July 14, 2021, Plaintiff had a

1 videoconference appointment with NP Valenzuela. *Id.* at 2476–84. Plaintiff reported her  
2 pain at 4/10 and indicated that her medication regimen provided 30–50% relief, and “her  
3 medications allow her to function during her days.” *Id.* at 2477. NP Valenzuela indicated  
4 that she would continue Plaintiff’s current pharmacotherapy regimen, and possibly reduce  
5 following post-operative results. *Id.* at 2482. On July 21, 2021, Plaintiff followed up with  
6 PA Paul after a permanent implant of a Nevro Spinal Cord Stimulator. *Id.* at 2472–75.  
7 Treatment records reflect that “[t]he current pain regimen is working well.” AR at 2472.  
8 PA Paul and a representative of the spinal cord stimulator company worked with Plaintiff  
9 to reprogram the stimulator for maximum effectiveness. *Id.* at 2475.

10 On August 16, 2021, Plaintiff followed-up with NP Valenzuela. *Id.* at 2744–51,  
11 2797–2804. Plaintiff reported her pain at 5/10. *Id.* at 2745, 2798. Plaintiff reported healing  
12 well from surgery; however, she was still working with the stimulator representative to  
13 find the settings that will help her back pain. *Id.* at 2749, 2802. NP Valenzuela did not  
14 modify Plaintiff’s pharmacotherapy. AR at 2750, 2803. On August 17, 2021, Plaintiff  
15 was seen by PA Paul for a post-operative evaluation. *Id.* at 2740–43. Treatment records  
16 reflect that Plaintiff was “doing well and report[ed] no new complaints[,]” with her “current  
17 pain regimen [] working well.” *Id.* at 2740. Treatment records further reflect that Plaintiff  
18 “ha[d] minimal postprocedural pain and [wa]s still managed with prescribed analgesic.”  
19 *Id.* at 2743.

20 On September 10, 2021, Plaintiff saw Marco A. Duran, M.D. at the Pain Institute of  
21 Southern Arizona. *Id.* at 2733–39. Dr. Duran removed Plaintiff’s sutures following spinal  
22 cord stimulator placement. AR at 2736–37. The procedure was unremarkable and well-  
23 tolerated. *See id.* Dr. Duran did not modify Plaintiff’s pharmacotherapy. *Id.* at 2737. On  
24 September 14, 2021, Plaintiff had a telemedicine appointment with NP Valenzuela. *Id.* at  
25 2724–32. Plaintiff reported her pain as 4/10. AR at 2725. NP Valenzuela maintained  
26 Plaintiff’s pharmacotherapy without alteration. *Id.* at 2730. On October 19, 2021, Plaintiff  
27 returned to NP Valenzuela for a medication check. *Id.* at 2715–23. Plaintiff reported her  
28 pain level at 4/10. *Id.* at 2716. NP Valenzuela did not modify Plaintiff’s pharmacotherapy.

1 *Id.* at 2721. Plaintiff indicated an interest in weaning off opioids. AR at 2721.

2 On November 11, 2021, Plaintiff had a follow-up with NP Valenzuela. *Id.* at 2706–  
3 14. Plaintiff reported a pain level of 4/10. *Id.* at 2707. Plaintiff further reported 30-50%  
4 pain relief with medication, which allowed her to function. *Id.* Plaintiff denied stepping  
5 down her oxycodone dosage. *Id.* at 2712. As such, NP Valenzuela did not modify  
6 Plaintiff’s pharmacotherapy. AR at 2721. On December 20, 2021, Plaintiff had a follow-  
7 up with NP Valenzuela. *Id.* at 2694–2702. Plaintiff reported her pain level at 2/10. *Id.* at  
8 2695. Plaintiff reported greater than 50% relief of her back pain following the Nevro spinal  
9 cord stimulator implant. *Id.* at 2699. Plaintiff indicated that she did not need a new  
10 prescription for oxycodone, because she still had pills remaining. *Id.* Plaintiff further  
11 reported her goal to be off opioids that year. AR at 2699–2700. NP Valenzuela did not  
12 modify Plaintiff’s pharmacotherapy. *Id.* at 2700.

13 On January 20, 2022, Plaintiff returned to NP Valenzuela for a follow-up. *Id.* at  
14 3020–28. Plaintiff reported her pain severity at 0/10. *Id.* at 3021. Plaintiff reported 100%  
15 relief of her back pain and indicated that she rarely needs to take a pain pill. *Id.* at 3025.  
16 NP Valenzuela noted that Plaintiff “still ha[d] 15 pills of the 40.5 pills from her last  
17 [appointment,] [and] we did not prescribe at her last [appointment.]” AR at 3025. NP  
18 Valenzuela indicated a plan to reduce the dosage of Plaintiff’s oxycodone prescription and  
19 posited that Plaintiff may not need to continue treatment with the Pain Institute. *Id.*

20 On March 15, 2022, Plaintiff saw NP Valenzuela for a follow-up visit. *Id.* at 3008–  
21 16. Plaintiff reported her pain level at 0/10. *Id.* at 3009. Plaintiff reported 100% relief  
22 from pain with her medications. *Id.* NP Valenzuela reported that Plaintiff was taking one  
23 (1) oxycodone per day as needed and “report[ed] more than 100% relief of back pain.” AR  
24 at 3014. NP Valenzuela did not modify Plaintiff’s pharmacotherapy. *Id.*

25 On April 19, 2022, Plaintiff had a follow-up with NP Valenzuela. *Id.* at 2999–3007.  
26 Plaintiff reported her pain level at 6/10. *Id.* at 3000. Plaintiff further reported complete  
27 pain relief with medication which “allow her to function during her days.” *Id.* NP  
28 Valenzuela noted that “today [Plaintiff] reports more than 100% relief of back pain.” AR

1 at 3005. NP Valenzuela discussed a plan to begin weaning Plaintiff down by 5 pills every  
2 2 months, and Plaintiff agreed. *Id.*

3 On May 17, 2022, Plaintiff followed-up with NP Valenzuela. *Id.* at 2990–98.  
4 Plaintiff reported her pain level as 5/10. *Id.* at 2991. Treatment records reflect Plaintiff  
5 was obtaining 100% relief from pain and reported that “her medications allow her to  
6 function during her days.” *Id.* at 2991, 2996. NP Valenzuela noted that Plaintiff was taking  
7 a pain pill per day as needed, and that they discussed weaning her off. AR at 2996. Plaintiff  
8 agreed with the plan to “wean down by 5 pills every 1-2 months.” *Id.*

9 On June 14, 2022, Plaintiff was seen by NP Valenzuela for a follow-up. *Id.* at 2981–  
10 89. Plaintiff reported her pain level at 4/10. *Id.* at 2982. Plaintiff reported that “her  
11 medications allow her to function during her days.” *Id.* Plaintiff “continue[d] to report  
12 100% relief of back pain with an occasional ‘bad day[,]’” following permanent  
13 implantation of a NEVRO spinal cord stimulator. *Id.* at 2986. NP Valenzuela discussed  
14 weaning off opioids with Plaintiff, and she agreed. AR at 2986. NP Valenzuela noted the  
15 plan was to “wean down by 5 pills every 1-2 months.” *Id.*

16 On July 21, 2022, Plaintiff returned to NP Valenzuela for a telemedicine  
17 appointment. *Id.* at 2969–77. Plaintiff reported her pain level at a 4/10. *Id.* at 2970. NP  
18 Valenzuela noted that Plaintiff was taking her Oxycodone as needed and rarely taking  
19 Tylenol for complete pain relief. *Id.* NP Valenzuela further noted that “[a]t past  
20 [appointments] we have discussed weaning off and she agrees, we will wean down by 5  
21 pills every 1-2 months[;] [a]t her last [appointment] I sent in 20 pill of her oxycodone 5/325  
22 mg and today she has 13, no meds will be sent in today.” AR at 2975.

23 On August 23, 2022, Plaintiff saw NP Valenzuela for a follow-up. *Id.* at 2960–68.  
24 Treatment records reflect that Plaintiff was “currently taking Oxycodone-apap 5-325mg  
25 PRN [(as needed)] and Tylenol 325 mg RARELY once daily for pain with 100% relief[.]”  
26 *Id.* at 2961 (emphasis in original). NP Valenzuela further noted Plaintiff underwent “a  
27 NEVRO [spinal cord stimulator] trial and ultimately a permanent implant on 7/7/2021 and  
28 continue[d] to report 100% relief of back pain with an occasional ‘bad day.’” *Id.* at 2966.



1 NP Valenzuela concluded that “[t]oday will be her last visit with us, she has done  
2 amazingly well[,] [s]he weaned off the oxycodone[.]” *Id.* Plaintiff indicated “[h]er next  
3 goal is to try and get out into the work force at least a few hours a day.” AR at 2966.

4 **2. Consultative Examiner Jeri B. Hassman, M.D.**

5 On August 15, 2021, Jeri B. Hassman, M.D. examined Plaintiff at the request of the  
6 Arizona Department of Economic Security (“AZDES”). AR at 2618–25. Plaintiff reported  
7 a long history of low back pain and indicated that it started in approximately 2014. *Id.* at  
8 2618. Plaintiff further reported that she underwent an L4/L5 discectomy in 2015. *Id.*  
9 Plaintiff indicated that she returned to work at “two jobs,” but then was involved in two (2)  
10 motor vehicle accidents in 2017 that caused a return of her low back pain. *Id.* Plaintiff  
11 reviewed her history of various treatments, culminating in the insertion of a spinal cord  
12 stimulator in 2018, which was replaced in 2018. *Id.* Plaintiff acknowledged that the spinal  
13 cord stimulator helped her leg pain, but indicated that she continued to have severe low  
14 back pain. AR at 2618.

15 Dr. Hassman’s review of Plaintiff’s systems noted frequent neck, mid back, and  
16 constant low back pain; occasional chest pain without shortness of breath; daily headaches;  
17 frequent constipation and occasional diarrhea; urinary urgency and frequency; and  
18 shooting pain and tingling down both legs. *Id.* at 2619. Dr. Hassman’s physical  
19 examination of Plaintiff found:

20 She ambulated with a slightly antalgic gait but without any assistive device.  
21 She said she uses a “walking stick” occasionally. Gait was stiff, but she had  
22 normal stride length and a slightly slow gait. She was able to stand and walk  
23 on her heels and able to stand and walk on her toes but could not hop on  
24 either foot. She could perform almost no bending because of low back pain,  
25 and could barely reach her fingertips to her proximal thigh level. She had  
26 normal balance for tandem walking. She was able to perform almost a full  
27 kneel, almost to the floor, but kept her back extremely straight and erect  
28 while she performed kneeling and held on for balance. She was independent  
getting in and out of the chair and independent getting on and off the  
examining table.

*Id.* at 2619–20. Dr. Hassman’s examination of Plaintiff’s head, heart, and upper



1 extremities was generally unremarkable. *Id.* at 2620. Dr. Hassman noted that Plaintiff had  
2 a negative Romberg sign. *Id.* Dr. Hassman observed minimal tenderness over Plaintiff's  
3 lumbar spine and paraspinal muscles. AR at 2620. Dr. Hassman reported Plaintiff "had  
4 pain and poor lumbar range of motion[.]" her straight leg raising test was positive  
5 bilaterally at 30 degrees, and "[s]he performed a log roll in order to get up from supine  
6 position." *Id.* Dr. Hassman observed a "full range of motion of both lower extremities  
7 without pain." *Id.* Dr. Hassman's examination of Plaintiff's lower extremities was  
8 unremarkable, except for "trace bilateral knee reflexes and absent bilateral ankle reflexes."  
9 *Id.* Dr. Hassman's diagnoses included "[c]hronic low back pain and status post  
10 laminectomy and spinal cord stimulator insertion[,] . . . [with] poor lumbar range of motion,  
11 a positive straight leg raising test bilaterally, and an antalgic gait[;]" . . . "[o]besity, diabetes  
12 mellitus, hypertension, and hyperlipidemia[;]" . . . "[p]ossible obstructive sleep apnea[;]"  
13 . . . [and] [a]llegations of PTSD, depression, and anxiety." *Id.*

14 Dr. Hassman completed a Medical Source Statement of Ability to Do Work-Related  
15 Activities (Physical) and reiterated her diagnoses. AR at 2622. Dr. Hassman opined that  
16 Plaintiff's conditions would impose limitations for twelve (12) continuous months. *Id.* Dr.  
17 Hassman further opined that Plaintiff could occasionally lift up to ten (10) pounds and  
18 frequently lift less than ten (10) pounds. *Id.* Dr. Hassman based her opinion on Plaintiff's  
19 chronic low back pain; poor lumbar range of motion; poor bending; slightly limited  
20 kneeling; obesity; and sharp, shooting, stabbing pains down both legs. *Id.* Dr. Hassman  
21 indicated that Plaintiff would be limited in her ability to stand and/or walk to between two  
22 (2) and four (4) hours in an eight (8) hour day. *Id.* Dr. Hassman reiterated that this  
23 limitation was due to Plaintiff's chronic low back pain; poor lumbar range of motion; poor  
24 bending; slightly limited kneeling; obesity; and sharp, shooting, stabbing pains down both  
25 legs. AR at 2623. Dr. Hassman reported that Plaintiff did not use and assistive device and  
26 be able to sit for six (6) to eight (8) hours in an eight (8) hour day. *Id.* Dr. Hassman noted  
27 the same reasons for this limitation, and opined that Plaintiff "would need more frequent  
28 change of position secondary to low back pain. *Id.*

1 Dr. Hassman found that Plaintiff was unlimited in her ability to see, hear, and speak,  
2 as well as her ability to reach, handle, finger, and feel. *Id.* Dr. Hassman further found that  
3 Plaintiff could never climb ladders, ropes, or scaffolds, never stoop, kneel, crouch, and  
4 crawl, and could only occasionally climb ramps and stairs. *Id.* Again, these findings were  
5 based upon Plaintiff's chronic low back pain; poor lumbar range of motion; poor bending;  
6 slightly limited kneeling; obesity; and sharp, shooting, stabbing pains down both legs. AR  
7 at 2624. Dr. Hassman opined that Plaintiff's "lumbar range of motion is extremely limited  
8 and prevents her from performing stooping." *Id.* Dr. Hassman further opined that Plaintiff  
9 was restricted in working around heights, moving machinery, and extremes in temperature,  
10 but not in her ability to work with or around chemicals, dust, fumes, gases, or excessive  
11 noise. *Id.*

## 12 13 **II. STANDARD OF REVIEW**

14 The factual findings of the Commissioner shall be conclusive so long as they are  
15 based upon substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g),  
16 1383(c)(3); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may  
17 "set aside the Commissioner's denial of disability insurance benefits when the ALJ's  
18 findings are based on legal error or are not supported by substantial evidence in the record  
19 as a whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted); *see*  
20 *also Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). "Under  
21 the substantial evidence standard, a court looks to an existing administrative record and  
22 asks whether it contains 'sufficien[t] evidence' to support the agency's factual  
23 determinations." *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019) (citations omitted)  
24 (alterations in original).

25 Substantial evidence is "more than a mere scintilla[,] but not necessarily a  
26 preponderance." *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d  
27 871, 873 (9th Cir. 2003)); *see also Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014).  
28 Further, substantial evidence is "such relevant evidence as a reasonable mind might accept

as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Where “the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ.” *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)); *see also Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007). Moreover, the court may not focus on an isolated piece of supporting evidence, rather it must consider the entirety of the record weighing both evidence that supports as well as that which detracts from the Secretary’s conclusion. *Tackett*, 180 F.3d at 1098 (citations omitted). Additionally, the Court will only review issues raised by Plaintiff in this cause of action. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).

### III. ANALYSIS

#### A. *The Five-Step Evaluation*

The Commissioner follows a five-step sequential evaluation process to assess whether a claimant is disabled. 20 C.F.R. § 404.1520(a)(4). This process is defined as follows: Step One asks is the claimant “doing substantial gainful activity[?]” 20 C.F.R. § 404.1520(a)(4)(i). If yes, the claimant is not disabled. Step Two considers if the claimant has a “severe medically determinable physical or mental impairment[.]” 20 C.F.R. § 404.1520(a)(4)(ii). If not, the claimant is not disabled. Step Three determines whether the claimant’s impairments or combination thereof meet or equal an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App.1. 20 C.F.R. § 404.1520(a)(4)(iii). If not, the claimant is not disabled. Step Four considers the claimant’s residual functional capacity and past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If claimant can still do past relevant work, then he or she is not disabled. Step Five assesses the claimant’s residual functional capacity, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If it is determined that the claimant can make an adjustment to other work, then he or she is not disabled. *Id.*

In the instant case, the ALJ found that Plaintiff had not engaged in substantial

1 gainful activity since her alleged onset date of March 20, 2018. AR at 1700. At step two  
2 of the sequential evaluation, the ALJ found that “[t]he claimant has the following severe  
3 impairments: lumbar spine degenerative disc disease and anxiety disorder, depressive  
4 disorder, borderline personality disorder and posttraumatic stress disorder (PTSD) (20 CFR  
5 404.1520(c) and 416.920(c)).” *Id.* At step three, the ALJ further found that “the claimant  
6 does not have an impairment or combination of impairments that meets or medically equals  
7 the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1  
8 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).” *Id.* at  
9 1701. Prior to step four and “[a]fter careful consideration of the entire record,” the ALJ  
10 determined that “the claimant has the residual functional capacity to perform sedentary  
11 work as defined in 20 CFR 404.1567(a) and 416.967(a) except claimant can never climb  
12 ladders, ro[p]es or scaffolds, occasionally climb ramps and stairs, balance stoop, kneel,  
13 crouch and crawl, can work in an environment with occasional exposure to temp extremes,  
14 vibrations and work hazards[,] . . . can understand remember and apply simple and detailed  
15 but not involved instructions[,] can interact with the public coworkers and supervisors as  
16 long as interactions are occ[asional] and superficial, [and] can adapt to minor changes in a  
17 routine work setting.” *Id.* at 1703. At step four, the ALJ found that Plaintiff “is unable to  
18 perform any past relevant work (20 CFR 404.1565 and 416.965).” *Id.* at 1711. At step  
19 five, the ALJ found that after “[c]onsidering the claimant’s age, education, work  
20 experience, and residual functional capacity, there are jobs that exist in significant numbers  
21 in the national economy that the claimant can perform (20 CFR 404.1569, 404.1569a,  
22 416.969, 416.969a).” AR at 1712. Accordingly, the ALJ determined that Plaintiff was not  
23 disabled. *Id.* at 1698, 1713.

24 ***B. Medical Opinion Evidence***

25 Plaintiff asserts that “[t]he ALJ’s rejection of Dr. Hassman’s findings with relation  
26 to postural abilities is not based on substantial evidence, and her failure to even address  
27 changes of position is legally erroneous.” Pl.’s Opening Br. (Doc. 19) at 10. The Court  
28 agrees with Plaintiff.

## 1                    **1. Legal Standard**

2                    Section 404.1520c, 20 C.F.R., governs the analysis of medical opinions for  
 3                    disability claims filed on or after March 27, 2017. “Under the revised regulations, ‘there  
 4                    is not an inherent persuasiveness to evidence from [government consultants] over [a  
 5                    claimant’s] own medical source(s), and vice versa.’”<sup>6</sup> *Woods v. Kijakazi*, 32 F.4th 785,  
 6                    791 (9th Cir. 2022) (alterations in original) (quoting Revisions to Rules Regarding the  
 7                    Evaluation of Medical Evidence, 82 Fed. Reg. at 5844)). Rather, medical opinions are  
 8                    evaluated pursuant to the factors set forth in Section 404.1520c(c)(1)–(5), with the most  
 9                    important factors being supportability and consistency. 20 C.F.R. § 404.1520c(c); *see also*  
 10                    20 C.F.R. § 404.1520c(b)(2). “Consistency means the extent to which a medical opinion  
 11                    is consistent with the evidence from other medical sources and non medical sources in the  
 12                    claim.” *Stiffler v. O’Malley*, 102 F.4th 1102, 1106 (9th Cir. 2024) (quoting *Woods*, 32  
 13                    F.4th at 792). “Supportability focuses on whether ‘a medical source supports a medical  
 14                    opinion by explaining the relevant objective medical evidence.’” *Id.* (quoting *Woods*, 32  
 15                    F.4th at 791–92). The regulations specifically require the ALJ to explain how he or she  
 16                    considered supportability and consistency in evaluating medical opinions and making the  
 17                    disability determination. 20 C.F.R. § 404.1520c(b)(2). Additionally, the ALJ may, but is  
 18                    not required to, consider other factors such as the medical source’s relationship with the  
 19                    claimant, the medical source’s area of specialization, or “evidence showing a medical  
 20                    source has familiarity with the other evidence in the claim or an understanding of our  
 21                    disability program’s policies and evidentiary requirements.” 20 C.F.R. 404.1520c(c)(3)–  
 22                    (5).

## 23                    **2. Analysis**

24                    The ALJ’s analysis of Dr. Hassman’s opinion is as follows:

25                    Consultative examiner Dr. Hassman opined in August 2021 that claimant

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26  
 27                    <sup>6</sup> The Ninth Circuit Court of Appeals has held that its previous “requirement that ALJs  
 28                    provide ‘specific and legitimate reasons’ for rejecting a treating or examining doctor’s opinion . .  
 . is . . . incompatible with the revised regulations. *Woods v. Kijakazi*, 32 F.4th 785, 792 (9th Cir.  
 2022).

1 could perform sedentary work, does not use an assistive device, can  
2 occasionally climb ramps and stairs, never perform any other postural  
3 function, and must avoid working around heights, moving machinery and  
4 temperature extremes. (Ex. 44F) the [sic] undersigned is not fully persuaded  
5 by this opinion. As while the postural limitations are supported by claimant's  
6 self report at the consultative examiner and her deferral of performance of  
7 these functions, it is inconsistent with the longitudinal evidence, which  
8 indicated her ability to bend and tie her shoes and display normal spinal range  
9 of motion. The undersigned finds that only occasional postural limitations  
10 are warranted, aside from the climbing of ladders, ropes or scaffolds. (Ex.  
11 43F pg. 98, 105, 114, 121, 128, 136, 142[.])

12 AR at 1711. Defendant asserts that Plaintiff is incorrect in her suggestion that the ALJ  
13 seems to be referencing the April 2019 examination and opinion of Karen Lunda, M.S.,  
14 P.T., which cannot provide substantial evidence to support the ALJ's rejection of stooping  
15 limitations. Def.'s Response (Doc. 21) at 9. Defendant urges that "[a]s the ALJ noted  
16 throughout her decision, the longitudinal record did not support limitations in excess of  
17 occasional postural with no climbing of ladders, ropes, or scaffolds." *Id.* (citations  
18 omitted). "Even under the new regulations, [however,] an ALJ cannot reject an examining  
19 or treating doctor's opinion as unsupported or inconsistent without providing an  
20 explanation supported by substantial evidence." *Woods v. Kijakazi*, 32 F.4th 785, 792 (9th  
21 Cir. 2022).

22 As an initial matter, there is no suggestion anywhere in Dr. Hassman's report that  
23 Plaintiff deferred performance of any functions. *See* AR at 2618–25. Furthermore, the  
24 record does not support a finding that Dr. Hassman based her opinion solely on Plaintiff's  
25 own reports. Additionally, the specific pages cited by the ALJ which are in Plaintiff's  
26 treatment records from the Pain Institute of Southern Arizona, do not contain any reference  
27 to postural limitations, and relate to telemedicine appointments with the Nurse Practitioner  
28 who was primarily responsible for Plaintiff's pharmacotherapy medication checks. *See*  
AR at 2569 (Ex. 43F/98, Jan. 12, 2021, telemedicine appointment with NP Valenzuela);  
AR at 2576 (Ex. 43F/105, Dec. 1, 2020, telemedicine appointment with NP Troupe); AR  
at 2585 (Ex. 43F/114, Oct. 15, 2020, telemedicine appointment with NP Valenzuela); AR  
at 2592 (Ex. 43F/121, Sept. 16, 2020, telemedicine appointment with NP Valenzuela); AR



1 at 2599 (Ex. 43F/128, Aug. 18, 2020, telemedicine appointment with NP Valenzuela); AR  
 2 at 2607 (Ex. 43F/136, July 20, 2020, telemedicine appointment with NP Valenzuela); AR  
 3 at 2613 (Ex. 43F/142, June 16, 2020, telemedicine appointment with NP Valenzuela). As  
 4 such, the Court finds the ALJ’s proffered reasons do not constitute substantial evidence to  
 5 reject Dr. Hassman’s opinion. Furthermore, it is not for this Court to attempt to divine  
 6 what the ALJ was thinking. “Long-standing principles of administrative law require us to  
 7 review the ALJ’s decision based on the reasoning and factual findings offered by the ALJ—  
 8 not *post hoc* rationalizations that attempt to intuit what the adjudicator may have been  
 9 thinking.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225–26 (9th Cir. 2009)  
 10 (citations omitted). The ALJ did not sufficiently explain why she rejected Dr. Hassman’s  
 11 opinion, and the Court finds this constitutes legal error.

### 12 **C. Remand**

13 “[T]he decision whether to remand the case for additional evidence or simply to  
 14 award benefits is within the discretion of the court.” *Rodriguez v. Bowen*, 876 F.2d 759,  
 15 763 (9<sup>th</sup> Cir. 1989) (*quoting Stone v. Heckler*, 761 F.2d 530, 533 (9<sup>th</sup> Cir. 1985)). “Remand  
 16 for further administrative proceedings is appropriate if enhancement of the record would  
 17 be useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (*citing Harman v.*  
 18 *Apfel*, 211 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2000)). Conversely, remand for an award of benefits  
 19 is appropriate where:

20 (1) the ALJ failed to provide legally sufficient reasons for rejecting the  
 21 evidence; (2) there are no outstanding issues that must be resolved before a  
 22 determination of disability can be made; and (3) it is clear from the record  
 23 that the ALJ would be required to find the claimant disabled were such  
 evidence credited.

24 *Benecke*, 379 F.3d at 593 (citations omitted). Where the test is met, “we will not remand  
 25 solely to allow the ALJ to make specific findings. . . . Rather, we take the relevant testimony  
 26 to be established as true and remand for an award of benefits.” *Id.* (citations omitted); *see*  
 27 *also Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “Even if those requirements are  
 28 met, though, we retain ‘flexibility’ in determining the appropriate remedy.” *Burrell v.*



1 *Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014).

2 Here, the ALJ committed legal error in assessing the medical opinion evidence. The  
3 Court has concerns that “[a]llowing the Commissioner to decide the issue again would  
4 create an unfair ‘heads we win; tails, let’s play again’ system of disability benefits  
5 adjudication.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted).  
6 There are two issues, however, which tip this matter in favor of remand. First, Plaintiff  
7 requests reversal and remand for further proceedings. Pl.’s Opening Br. (Doc. 19) at 10.  
8 Second, based on the record, it is not clear to the Court that Plaintiff is disabled. This  
9 analysis requires reconsideration of the evidence in this case. As such, the Court  
10 recommends remand on an open record.

#### 11 12 **IV. CONCLUSION**

13 Based on the foregoing, the Court finds the ALJ committed legal error in assessing  
14 the medical opinion evidence. Such error requires reversal and remand, and the Court will  
15 direct reanalysis on an open record.

#### 16 17 **V. RECOMMENDATION**


18 For the reasons delineated above, the Magistrate Judge recommends that the District  
19 Judge enter an order REVERSING and REMANDING the Commissioner’s decision for  
20 further consideration.

21 Pursuant to 28 U.S.C. § 636(b) and Rule 72(b)(2), Federal Rules of Civil Procedure,  
22 any party may serve and file written objections within fourteen (14) days after being served  
23 with a copy of this Report and Recommendation. A party may respond to another party’s  
24 objections within fourteen (14) days after being served with a copy. Fed. R. Civ. P.  
25 72(b)(2). No replies shall be filed unless leave is granted from the District Judge. If  
26 objections are filed, the parties should use the following case number: **CV-23-0387-TUC-**  
27 **AMM.**

28 . . .

1 Failure to file timely objections to any factual or legal determination of the  
2 Magistrate Judge may result in waiver of the right of review.

3 Dated this 6th day of August, 2024.

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6 Eric J. Markovich  
7 United States Magistrate Judge  
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